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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

STEVEN JARMUS, Plaintiff and Respondent, v. MARK JARMUS, as Trustee, etc., et al., Defendants and Appellants.	B288377 (Los Angeles County Super. Ct. No. BP173009)

APPEAL from an order of the Superior Court of Los Angeles County, Roy L. Paul, Judge. Affirmed.

Law Office of Lawrence M. Lebowsky, Lawrence M. Lebowsky and Margaret M. Sedy for Defendants and Appellants.

Seyfarth Shaw, Alan T. Yoshitake and Patricia N. Chock for Plaintiff and Respondent.

The probate court construed a trust to make a residual gift to the trustor's three children that would be valued on the date of its distribution as opposed to the date of death. Two of the three beneficiaries, the trustee and his sister who are required by the trust to make an equalization payment to their brother, appeal from the probate court's ruling contending that the trust made a specific gift of real property to them that must be valued as of the date of their father's death in 2013, for around $1.55 million less than its current value. As substantial evidence and equity support the probate court's interpretation, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. The trust and dispute

Leslie Jarmus (Leslie) created the Leslie Jarmus Family Trust on June 4, 2009 (the trust) that became irrevocable upon his death. Leslie was the initial trustee. He died on August 4, 2013, leaving three children, Mark, Cheryl, and Steven.[1] Mark became the successor trustee. Attorney Tobi Chinski prepared the trust at Leslie's direction. So much was stipulated to by the parties.

The trust owned an income-producing apartment building on North Citrus Avenue (Citrus) in Los Angeles, where Cheryl and Mark live, along with some securities and bank accounts. The trust directs that the trustee shall divide the estate upon Leslie's death into equal shares for those of his children who are

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[1] We refer to the members of the Jarmus family by their first names for clarity and not out of disrespect. (*Farag v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 372, 374, fn. 1.) Steven is variously referred to in the trust and during trial as Steven and Steve. When not quoting, we will refer to him as Steven.

alive when Leslie dies, and administer the shares as separate trusts. Such shares need not be physically divided or segregated unless any of the ensuing trusts is terminated.

Three years after Leslie's death, the estate had not yet been divided into separate subtrusts and a dispute arose among Mark, Cheryl, and Steven about how Mark was to distribute the estate and assess the value of Citrus. Steven petitioned for instructions in the probate court in April 2016 seeking, among other things, removal of Mark as trustee, distribution of the trust assets, interpretation of the trust and of how the trust corpus should be distributed, and a valuation of Citrus. Mark, joined by Cheryl, objected and the dispute became contentious. The parties agreed to bifurcate from the remaining issues the question of when to distribute and value the assets, but disagreed as to what issues would be tried first. The probate court granted Mark's motion to try the question of valuation and distribution first.

The parties stipulated that "[t]he sole" issue for trial in the bifurcated matter "is whether the Trust provides for: [¶] a. A specific gift of . . . Citrus . . . to Mark and Cheryl, with the Trust estate to be valued as of [the] date of Decedent's death; [¶] or [¶] b. A residual gift to Mark, Cheryl, and Steven, with the Trust estate to be valued as of the date of distribution." Mark and Cheryl advocated for interpretation (a), whereas Steven argued for construction (b). At the time of Leslie's death, the parties agree that Citrus was worth around $1.2 million. At the time of trial, Citrus had appreciated and was worth approximately $2.75 million.

This case focuses on the trust's article five, entitled "Distribution of Income and Principal Following My Death" (full capitalization omitted), paragraph 2, "Division into Shares"

(paragraph 2). Paragraph 2 reads in pertinent part, with each sentence numbered for clarification: (1) "Upon my death, the Trustee shall divide the trust estate into as many equal shares as I have children then living and children then deceased who have issue then living. [**2**] If, at the time of my death, I own or the trust estate consists of the improved real property commonly known as [Citrus] . . . , the Trustee shall allocate . . . Citrus . . . to the shares for the benefit of my children, Mark and Cheryl, and shall distribute to my son, Steve, other assets equal in value. [**3**] For example, if the value of the trust estate available for distribution is $1,200,000 consisting of . . . Citrus . . . valued at $900,000 and other assets valued at $300,000, each of my children shall be entitled to distribution of $400,000. [**4**] Mark and Cheryl shall receive distribution of . . . Citrus . . . and Steve shall receive distribution of the other assets, except, however, because the value of . . . Citrus . . . received by each Mark and Cheryl exceeds by Fifty Thousand Dollars ($50,000) the value of the one-third (1/3) equal share to which they are each entitled, Mark and Cheryl shall each owe to Steve Fifty Thousand Dollars ($50,000) in order to equalize the share to which Steve is entitled. [**5**] Mark and Cheryl shall each equalize Steve's share by paying to him cash, or cash and a promissory note or all promissory note, the terms of which shall be determined between and among Mark, Cheryl and Steve. [**6**] Each share set aside for one of my children shall be distributed to such child, outright and free of trust."

Article eight, paragraph 6 additionally gives the successor trustee, when dividing the trust property into shares, the discretion to make the division or distribution in kind or partly in kind and partly in money, at values determined by the trustee.

This article authorizes the sale of trust property as the trustee deems necessary, "except, however, if at the time of my death, the trust estate consists of improved real property, it is my desire that the Trustee shall not be forced to sell such property in order to make distribution." Article 8 also authorizes the trustee, in his discretion, to make a non-pro rata division and distribution, "as long as" the assets allocated, or distributed to the separate trusts or shares "have equivalent or proportionate fair market values."

The probate court held a one-day trial.

II. Tobi Chinski's testimony

Chinski,[2] who specializes in estate planning and probate and trust administration, drafted the trust. She repeatedly testified that Leslie's express intent was that all three children share equally in the estate by creating equal shares as of the date of distribution. Consistent with Leslie's intent, paragraph 2 is a residuary bequest of equal shares among the three children. It is her practice to put specific bequests in a separate paragraph entitled "specific bequest of real property." Parsing paragraph 2, Chinski explained that the first sentence indicates Leslie's intent that the residuary be divided into three equal shares. Chinski then explained that the second sentence is a directive to the trustee to allocate Citrus to the shares of Mark and Cheryl. Chinski considered the second sentence to be a continuation of the first sentence describing what to do with the residual bequest. Chinski testified that Leslie did not intend, by specifically identifying Citrus in the second sentence, to convert

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[2] Chinski did not bring her notes to trial as she was not asked to. As a result, the probate court had "significant distrust about [Chinski's] testimony."

the residual gift into a specific gift. The word "if" in the second sentence was to be used as a conditional for purposes of determining whether Citrus was part of the estate to be allocated, not to convert that real estate into a specific bequest.

As originally written, the trust did not mention Citrus. On the draft, Chinski wrote: "Citrus to Mark and Cheryl." Chinski explained that she modified paragraph 2 based on her meeting with Leslie by adding sentences 2 through 5. That addition was the only modification she made to paragraph 2. Leslie intended Citrus go to Mark and Cheryl "[*i*]*n satisfaction of their one-third share*." (Italics added.)

Leslie and Chinski "anticipated a very brief administration," "done in a matter of months," because there were few assets and the children were compatible. Because of the anticipated short administration period, she and Leslie expected that the value of the corpus would be the same whether appraised at the date of death or at the date of distribution. Given administration has taken years, the appropriate way to equalize the distribution so that each child receives an equal share, Chinski explained, would be to use the date-of-distribution value. It is not possible, Chinski testified, to make an allocation and determine the amount of an equalization payment before administration is complete because there are always taxes and expenses of, and income during, administration that must be deducted from or added to the value of the corpus.

III. John A. Hartog's testimony

Hartog, Steven's expert in trusts and estates, estate planning, and trust administration, opined that paragraph 2 constitutes a residual bequest to three beneficiaries in equal

shares. He explained that Leslie's intent was to make equal gifts, not a specific gift.

If Citrus were a specific gift, then there would be no need for equalization. As paragraph 2 speaks in terms of equalizing payments, sentence 2 is a direction to the trustee to use Citrus as an equalizing payment. If the real property were deemed a specific gift, division would be unequal contrary to sentence 1. When all of the gifts are residual, then no beneficiary has a vested right in any particular asset of the trust; only to one-third share of the residue after administration is concluded and the assets are prepared for distribution.

If sentence 2 were intended to modify or restrict the residuary intent of sentence 1 to create a specific bequest, then it would have started with, " 'notwithstanding the preceding sentence,' " and the example in sentences 3 through 5 would be unnecessary. To make Citrus a specific gift and still equalize the value of the corpus, the trust would read, "I give Citrus to Cheryl and Mark, and then, I give Steve an equivalent amount." The specific gift would also be set out in a separate paragraph. Confirming Chinski's practice, Hartog explained that the custom and practice in the field, when drafting or when reviewing trusts others have drafted, is to put specific gifts in a separate provision of the trust. The only times Hartog has seen specific bequests conflated with residual ones is in holographic wills.

The word "allocation" is a term of art in trust administration meaning apportionment, Hartog clarified. It is a direction to the trustee to fund a gift, usually a residual gift, not to distribute a specific bequest. Sentence 2 of paragraph 2 is an allocation clause and so it does not require Mark and Cheryl to

take Citrus. They could decline it and the trustee would sell it and distribute the proceeds in three equal shares.

Sentence 6 is the distribution clause of one share to each child. It is a direction to the trustee, manifesting Leslie's intent that a gift of two-thirds of the estate to Cheryl and Mark should be satisfied with Citrus, but the bequest is still for two-thirds of the estate, not of the specific property by itself. Characterizing Citrus as a specific gift would defeat the purpose of equality.

IV. Marshal A. Oldman

Oldman, the trusts and estate expert for Mark and Cheryl, found that Chinski's language was not as precise as she intended, and so reasonable minds could differ about what paragraph 2 means. He agreed that paragraph 2 starts as a residuary clause, as it was in the original draft. Paragraph 2 contains an equalization payment that could not be fully calculated until the rest of the estate was distributed to Steven. However, the insertion of Citrus, which is causing the confusion, made paragraph 2 "hermaphrodite [in] nature." Sentence 2 converts sentence 1 into a specific bequest, he opined. Oldman testified, on balance, Citrus was a specific gift of particular property to identified individuals. Thus, Oldman concluded paragraph 2 is residuary at the beginning, specific in the middle, and residuary to Steven at the end.

Although paragraph 2 created a hybrid under which it made a specific gift, that gift did not overcome the equal share distribution. Oldman explained, there is nothing in the trust that indicates valuation occurs at distribution, but "significant[ly]," sentence 2 reads, "upon my death." In combination with other sentences in paragraph 2, Oldman would advise a trustee that he saw no reason that Citrus could not be

distributed to Mark and Cheryl immediately. In his view, characterizing Citrus as a specific bequest would effectuate an equal division of the estate based on date-of-death values. But he also acknowledged that characterizing the bequest as a specific gift would not effectuate equal division as of the date of distribution.

V. The ruling

The probate court ruled that a preponderance of the evidence supported the finding that the trust provided for a residual gift to the three children to be valued as of the date of distribution. The court found Hartog to be the more persuasive expert because he considered Leslie's intent. Expressing concern that Chinski failed to bring her notes to trial, the court nonetheless found "credible" and gave "weight" to her "adamant" testimony about Leslie's intent. The court also believed Chinski's testimony that she and Leslie expected that administration of the trust to be quick, and found that Chinski credibly explained the discrepancy between her deposition testimony—that valuation would occur at the date of death—and her trial testimony—that it would occur at the date of disposition. While agreeing with Oldman's characterization of paragraph 2 as a "chameleon" or "hermaphrodite" in how it jumped from residual to specific and back to residual, the court then observed that Oldman did not discuss Leslie's intent. Based on case law, the court ruled that the trust's description of Citrus did not convert it to a specific gift or override the residuary meaning of sentence 1. After the court

entered its order reflecting this ruling, Cheryl and Mark filed their timely appeal.[3]

DISCUSSION

I. Standard of review

" 'The interpretation of a will or trust instrument presents a question of law unless interpretation turns on the credibility of extrinsic evidence or a conflict therein.' " (*Blech v. Blech* (2018) 25 Cal.App.5th 989, 1001 (*Blech*).) When extrinsic evidence is properly admitted to construe a trust instrument, and such evidence is conflicting, we will accept or adhere to the interpretation adopted by the probate court as long as that interpretation is supported by substantial evidence. (*Estate of Ehrenfels* (1966) 241 Cal.App.2d 215, 222.) Questions of law are nonetheless reviewed de novo. (*Ammerman v. Callender* (2016) 245 Cal.App.4th 1058, 1072 (*Ammerman*).)

The guiding principle of trust construction is to give effect to the intent of the testator as it appears from the whole of the trust instrument, not just separate parts. (*Estate of Cairns* (2010) 188 Cal.App.4th 937, 944; Prob. Code, § 21102.)[4] Courts

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[3] This appeal, taken from an order entered after a bifurcated trial, appears to be appealable under Code of Civil Procedure section 904.1, subdivision (a)(10) and Probate Code section 1300, subdivision (c) as taken from a ruling that effectively declines to confirm the acts of the trustee. If, however, the order were not appealable, we would exercise our discretion to treat the appeal as a petition for writ of mandate. (*Esslinger v. Cummins* (2006) 144 Cal.App.4th 517, 523.)

[4] Probate Code section 21102 reads: "(a) The intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument. [¶] (b) The

" 'may also consider the necessary implication arising from the language of the instrument as a whole.' " (*Ammerman*, *supra*, 245 Cal.App.4th at p. 1074.) Courts construe "[a]ll parts of an instrument . . . in relation to each other and so as, if possible, to form a consistent whole. If the meaning of any part of an instrument is ambiguous or doubtful, it may be explained by any reference to or recital of that part in another part of the instrument." (Prob. Code, § 21121.) Probate Code section 21120 directs that "[t]he words of an instrument are to receive an interpretation that will give every expression some effect, rather than one that will render any of the expressions inoperative."

II. Transfer classifications

As we recently explained in *Blech*, *supra*, 25 Cal.App.5th at page 1000, a revocable trust contains transfers that become irrevocable on the death of the settlor and are statutorily described as "at-death transfers."[5] Probate Code section 21117 defines those transfers, reading in pertinent part, "(a) A specific gift is a transfer of specifically identifiable property. [¶] . . . [¶] (f) A residuary gift is a transfer of property that remains after all specific and general gifts have been satisfied."

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rules of construction in this part apply where the intention of the transferor is not indicated by the instrument. [¶] (c) Nothing in this section limits the use of extrinsic evidence, to the extent otherwise authorized by law, to determine the intention of the transferor."

[5] "As used in this part, 'at-death transfer' means a transfer that is revocable during the lifetime of the transferor, but does not include a joint tenancy or joint account with right of survivorship." (Prob. Code, § 21104.)

Notwithstanding these definitions, "[t]he intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument." (Prob. Code, § 21102.) Also, the terms of the particular dispositive plan must be carried out even when they differ from that which would otherwise be called for under a statute. (*Blech*, *supra*, 25 Cal.App.5th at p. 1001, citing Prob. Code, § 16335, subd. (a)(1).)

III. Leslie's intent was to leave his children equal shares of the estate.

It is manifest from the language of the trust that Leslie intended to treat his three children equally. The probate court found Chinski was adamant about it. The words equal or equalize appear five times in paragraph 2 alone. This intent is further underscored in the final sentence of article eight, paragraph 6, which allows for distribution of the corpus in kind or non-pro rata division of the corpus, "*as long as*" the allocation or distributions "have *equivalent* or *proportionate* fair market values." (First and second italics added.)

It was likewise Leslie's intent that Mark and Cheryl receive Citrus, that the trustee not be forced to sell Citrus, and that Steven's share be made up of estate property of an equivalent value.

A. *The evidence supports the probate court's conclusion that Citrus is part of the residuary*

The probate court admitted extrinsic evidence in aid of its interpretation of paragraph 2. As Oldman explained, reasonable minds differed about its meaning. Mark and Cheryl contend that by identifying Citrus and its recipients by name in paragraph 2, Leslie intended to create a specific gift. (Prob. Code, § 21117, subd. (a).) Steven counters that the only way to carry out Leslie's

intent is to read the whole of paragraph 2 as residuary. (*Id.*, subd. (f).) We agree with Steven.

Paragraph 2 of article five is the only provision in the entire trust that identifies gifts. Sentence 1, requires the trustee to "divide the trust estate into . . . *equal shares*," without identifying any particular property or specifying the division in terms of character. (Italics added.) The witnesses agreed that sentence 1 made a residuary gift of *shares*. Looking more broadly at paragraph 2 as a whole, it continues to describe the gifts as generic shares, provides for the division of everything the estate owns, and directs the equalization between those shares. Construing paragraph 2 as a residuary gift is consistent with Probate Code section 21117, subdivision (f) by transferring all "that remains after all specific and general gifts have been satisfied," and comports with Leslie's intent for equality among his beneficiaries.

Oldman testified that on balance, sentence 2, "If, at the time of my death, I own . . . [Citrus], the Trustee shall allocate . . . Citrus . . . to the shares for the benefit of my children, Mark and Cheryl," *converted* the residuary nature of sentence 1 into a specific gift. Chinski, who drafted the trust, testified that Leslie did not intend to convert Citrus to a specific gift merely by naming it.

Sentence 2 commands the trustee to "*allocate* [Citrus] to the shares for the benefit of my children, Mark and Cheryl" and to "*distribute* to my son, Steve, other assets equal in value." (Italics added.) Hartog explained that allocate in this context is a term of art meaning apportion, not distribute. Even in its

ordinary sense (Prob. Code, § 21122),[6] the word allocate cannot mean distribute, given the two words' juxtaposition in the same sentence. Despite Oldman's reading of these words interchangeably, we cannot disregard that sentence 2 employs different verbs for the gifts. Instead, as Hartog explained, sentence 2 was meant as a directive to the trustee to allot Citrus in satisfaction of Mark's and Cheryl's *shares*, not to distribute a gift outright. And, the formula in sentences 3 through 5 explains how to accomplish the allotment evenhandedly. If Citrus were a specific gift, there would be no need to use the word allocate in sentence 2 and the sample formula in sentences 3 through 5 would be superfluous in violation of Probate Code section 21120. Naming Citrus in sentence 2 cannot convert the gift to a specific transfer or create a hybrid out of paragraph 2, where Leslie's intent was to make gifts of shares of equal value.

Classifying Citrus as a specific gift as Mark and Cheryl would have it, also cannot be squared with the trust's requirement that Citrus be "allocate[d] *to the shares for the benefit of* my children, Mark and Cheryl" (italics added), the residual nature of sentence 1, and the equalization requirements throughout the second paragraph. Sentence 2 does not provide,

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[6] Probate Code section 21122 requires courts to give the words of an instrument "their ordinary and grammatical meaning unless the intention to use them in another sense is clear and their intended meaning can be ascertained. Technical words are not necessary to give effect to a disposition in an instrument. Technical words are to be considered as having been used in their technical sense unless (a) the context clearly indicates a contrary intention or (b) it satisfactorily appears that the instrument was drawn solely by the transferor and that the transferor was unacquainted with the technical sense."

for example, "I give Citrus to Mark and Cheryl and the rest to Mark, Cheryl, and Steven in equal shares," or "notwithstanding sentence 1, I give Citrus to Mark and Cheryl." Reading Citrus as converting the residuary gift to a specific one that vested in Mark and Cheryl free of the trust at Leslie's death would make Steven the only residuary beneficiary and eliminate the need for equalization. Mark's and Cheryl's interpretation violates the trust's repeated requirements of equal shares and of equalization payments.

Furthermore, Chinski testified that it was her practice, and Hartog confirmed that it was a custom when drafting and administering trusts, to segregate specific gifts in their own trust provisions. As the trust's drafter, Chinski's testimony is highly probative. (See *Ammerman*, *supra*, 245 Cal.App.4th at p. 1074.) Had Leslie intended the gift of Citrus to be a specific transfer, Chinski would have provided for it in a separate paragraph. The logical implication from the lack of any such provision in the trust is that Leslie did not mean Citrus to be a specific transfer.

It has long been the general rule in California that "the enumeration of specific articles in a residuary clause will not necessarily make the bequest specific as to such articles." (*Estate of Painter* (1907) 150 Cal. 498, 506 (*Painter's Estate*).) The issue there was whether a provision in the codicil to the decedent's will describing particular properties created specific gifts and hence could not be used to pay general legacies. (*Id.* at p. 503.) Our Supreme Court held, as the list of specific properties to be devised was followed immediately by a statement that they were to be given together with all of the decedent's other property, that the listed properties were part of the residue rather than specific transfers. The court in *Painter's Estate* stated: "In short, the

question is purely one of construction. The testator's intent is to be determined in each case from a consideration of the particular language employed. A bequest or devise of the residue of an estate is general, because such residue is not ascertainable at the time the will is made. *The fact that, in giving such residue, the testator describes, as included in it or forming a part of it, certain specific property owned by him, does not alter the character of the residuary gift*." (*Id*. at p. 507, italics added.)[7] We recently relied on *Painter's Estate* to reach the same conclusion based on the particular trust language in *Blech*, *supra*, 25 Cal.App.5th at pages 1004 to 1006. Where paragraph 2 generically describes the gifts as equal shares and requires equalization payments, its identification of Citrus by name does not alter the character of the gift to all three children as residuary.

Mark and Cheryl quote from sentences 1 and 2, "[u]pon my death" and "at the time of my death," to argue that the plain language of the trust requires that the estate be divided and valued at the time of Leslie's death. This argument improperly cherry picks words from paragraph 2 in violation the requirement in Probate Code section 21121 that "[a]ll parts of an instrument are to be construed in relation to each other and so as, if possible, to form a consistent whole."

Rather, following Leslie's intent to make a residuary gift of equal shares to his children, the use of the phrase upon my death in sentence 1 identifies the trust's beneficiaries ("children then

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[7] *Painter's Estate* relied in part on former Civil Code section 1357. (*Painter's Estate*, *supra*, 150 Cal. at pp. 505–506.) Similar to today, at the time, residuary legacy " 'embrace[d] only that which remains after all the bequests of the will are discharged.' " (*Blech*, *supra*, 25 Cal.App.5th at p. 1005, fn. 37.)

living") and establishes the residual nature of the gift ("divide the trust estate into . . . equal shares"). As for sentence 2, Mark and Cheryl ignore the conditional at the beginning, i.e., "*If*, at the time of my death, I own or the trust estate consists of . . . Citrus." (Italics added.) Chinski testified that her use of "if" was not to override the residuary intent of sentence 1, but to condition allocation of Citrus on that real estate being part of the corpus when Leslie died. (Cf. *Batcheller v. Whittier* (1909) 12 Cal.App. 262, 266 [conditional clause introduced by " 'if' "].) Chinski's testimony supports the probate court's conclusion that, instead of specifically devising Citrus upon Leslie's death, sentence 2 identifies a particular address for a conditional allocation to two shares, as part of a residuary clause transferring all of Leslie's assets to his three children in equal shares.

Therefore, "[a]lthough [the probate court's] interpretation is not conclusive on appeal, the rule is that if the construction given to the will by the probate court appears to be reasonable and consistent with what the record shows as to the intent of the testator, the appellate court will not substitute another interpretation even though it may seem equally tenable." (*Estate of Scott* (1963) 217 Cal.App.2d 111, 117.) The evidence here supports the probate court's conclusion that Leslie's intent, as expressed in the trust (Prob. Code, § 21102, subd. (a)), was to create residuary gifts of equal shares from the whole of the estate, and that Citrus would be allotted to Mark's and Cheryl's shares while Steven's share would be made up of other assets together with the equalizing payments from his siblings.

b. *The residuary shares must be valued at the date of their distribution*

Essentially, residuary gifts are valued and distributed at the end of administration because they include what is left over after satisfaction of specific and general gifts (Prob. Code, § 21117, subd. (f)), and after payment of the estate's debts, which include administration expenses, charges against the estate such as taxes, expenses of last illness, and family allowance. (Prob. Code, § 11420.)

The parties agree that the trust is silent about when valuation was to occur. Chinski testified at trial that to make an equal distribution of all of the shares, valuation must occur, not at the time of Leslie's death, but after administration when the property is distributed. Although her deposition testimony was to the contrary, she explained at trial that Leslie expected administration to be quick because the estate was relatively small and the children were compatible, and so the value of the estate was not expected to change much from the date of his death to the date of distribution. The probate court found this explanation for the discrepancy in Chinski's trial and deposition to be credible.

Oldman agreed with Chinski that allocating shares and determining the amount of the equalization payment could not occur before administration because income and expenses must be added and deducted from the estate's value.

Mark and Cheryl, however, cite the first sentence of paragraph 2 ("*Upon my death,* the Trustee *shall divide* the trust estate into as many equal shares as I have children") (first and second italics added) and article eight, paragraph 5 ("[e]ach share into which the trust estate is divided pursuant to the provisions

of this Agreement shall constitute and be administered as a separate trust"). They argue that Leslie "plainly and unambiguously" stated his intent on the face of the trust that their beneficial interests *vested* in Citrus as of the date of death when those subtrusts were created and the assets were deemed allocated and so Citrus must be valued as of the date Leslie died. Their expert Oldman testified that where sentence 2 commences with "at the time of my death," equal division of the estate could be accomplished by valuing all of the corpus on the date of Leslie's death.

Leslie's intent for equality cannot be accomplished if the shares are valued at different times. Oldman admitted as much when he explained that characterizing Citrus as a specific transfer would result in an unequal division at distribution. All parties agree, as the Probate Code indicates, Steven's gift cannot be ascertained and valued until after administration and payment of debts, taxes, and other charges against the estate. Hence, had Citrus been distributed free of the trust to Mark and Cheryl *and valued* on the date of Leslie's death, then those two beneficiaries would have received the income from it along with its increasing value, while Steven, who must wait until after administration to ascertain his share, would have had nothing in hand meanwhile that could bring him income or increase in value. This approach is out of step with Leslie's manifest intent as expressed in the trust to divide the trust corpus into equal shares, and to assure that whatever is distributed have equivalent or proportionate fair market values. Therefore, the only way to allocate Citrus to Mark and Cheryl's shares with an equalizing payment to Steven is to value all of the estate at the same point in time. Where Steven's share cannot be distributed

and valued until after administration is complete, valuation of all assets must necessarily occur then.

Abandoning their stipulation at trial that the gift of Citrus was specific, Mark and Cheryl cite *Ammerman*, *supra*, 245 Cal.App.4th 1058 to declare "[w]hether classified as a specific or residual gift, or merely as an allocation of a particular property to their shares, [Leslie's three children's] beneficial interests in . . . Citrus . . . vested at the time of the Trustor's death *as a matter of law*." (Italics added.)

At issue in *Ammerman*, *supra*, 245 Cal.App.4th at page 1062 was how the residue was to be divided. There, the probate court used a " 'changing fraction method' " to divide the residuary, which resulted in a revaluation and changing the allocation from the original one-third allocation to each beneficairy. (*Ibid.*) *Ammerman* interpreted the language of the particular trust at issue there. It specified that " '[*o*]*n the death of the settlor*, *and after the [specific] distributions*' are made, 'the trustee shall divide the trust estate . . . into separate parts or shares. This division shall be made either by physical segregation of the assets or by assignment or transfer of undivided interests in the whole or any part of the trust property.' " (*Id*. at p. 1064, italics added.) That trust also stated that "when the Trustees are 'directed to make a distribution of trust assets or a division of trust assets into separate trusts or shares *on the death of the settlor*,' the Trustees *may defer distribution or division for a period of six months*." (*Id*. at p. 1080, italics added.) Based on that language, *Ammerman* held it was "clear the residuary assets were to be divided on [the trustor's] death." (*Id*. at pp. 1087–1088.) Continuing, *Ammerman* concluded, "it makes sense to have an administrative

period allowing the Trustees to marshal the Trust's assets and withhold distribution during the closing period. But the Trustees must still treat the residuary assets as if divided as of the date of death." (*Id*. at p. 1080.)

We do not disagree with Mark and Cheryl insofar as they assert that Leslie intended for the estate to be *divided* upon his death into equal shares. Paragraph 2 spells that out, and Leslie and Chinski contemplated a short period of administration. (See *Estate of Taylor* (1967) 66 Cal.2d 855, 858 [trustors contemplate prompt distribution absent indication otherwise].) However, there has been no division yet. Unlike *Ammerman*, *supra*, 245 Cal.App.4th at page 1080, where the trust provided for a six-month administration period, that is not what has occurred here. And the delay is the cause of the dispute. It would be manifestly unfair and antithetical to Leslie's express intent that the beneficiaries receive *equal shares*, for Mark as trustee and Cheryl to reap the windfall of an early valuation of Citrus, while Steven waited until administration is complete to receive his share, particularly where the timing of distribution is partly in Mark's hands. The probate court has the equitable power to ensure that one beneficiary does not receive a benefit at the expense of another. (*Estate of Kampen* (2011) 201 Cal.App.4th 971, 998.) Where paragraph 2 made residuary gifts, given Leslie's manifest intent for equality among his children, and as distribution has not yet occurred, regardless of whether the shares "vested" when Leslie died in 2013, all of the beneficiaries must wait until administration is complete to value the shares. (See *Ammerman*, at p. 1088.) The probate court did not err in interpreting the trust to require valuation at the time of distribution of Leslie's entire estate.

DISPOSITION

The order is affirmed. Steven Jarmus is awarded his costs on appeal.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J.

EGERTON, J.